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No.

IN THE

Supreme Court of the United States

R. C. FRENCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AS EVIDENCED BY ITS OPINION OF JULY 28, 1982, ERRED IN AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI FINDING DEFENDANT GUILTY ON THREE COUNTS OF VIOLATING 7 U.S.C. SEC. 2024(b) (FOOD STAMPS - ILLEGALLY OBTAINING) IN THAT:

A. THIS CASE CONSTITUTES A CONVICTION OF ILLEGALLY BUYING FOOD STAMPS BASED ON ENTRAPMENT. THE GOVERNMENT'S EVIDENCE ESTABLISHED THAT THE ORIGINAL DESIGN AND INITIATION OF THIS CRIME OCCURRED IN THE MIND OF, AND AT THE INSTIGATION OF, AND IMPLEMENTATION OF GOVERNMENT AGENTS. DEFENDANT WAS NOT TRAFFICKING IN FOOD STAMPS AND WAS NOT PREDISPOSED TO BUY THE SAME. HE WAS SELECTED AS A TARGET BECAUSE OF PRIOR FELONY CONVICTION AND BECAUSE HE WAS PLACED ON PROBATION FOR THE SAME. THE ACTIONS OF THE GOVERNMENT AGENTS HEREIN CONSTITUTED "ENTRAPMENT" AS A MATTER OF LAW, AND THE TRIAL COURT AND APPELLATE COURT ERRED IN FAILING TO SO DECLARE.

THE GOVERNMENT FAILED TO OFFER SUFFICIENT EVIDENCE SHOWING PREDISPOSITION ON THE PART OF THE DEFENDANT SO AS TO MAKE THE MATTER A JURY QUESTION.

FURTHER, THE ACTIONS OF THE GOVERNMENT AGENTS AMOUNTED TO ACTIONS OF AGENTS PROVOCATUER AND SHOULD BE CONDEMNED AS AGAINST PUBLIC POLICY. GOVERNMENTAL AGENTS SHOULD NOT BE ALLOWED TO MAKE SUBJECTIVE DECISIONS AS TO THE PREDISPOSITION OF INDIVIDUALS TO COMMIT CRIMES AND TO THEREAFTER CREATE CRIMES TO ENTRAP INDIVIDUAL DEFENDANTS. SUCH AGENTS MUST BE RESTRICTED IN MAKING ENTRAPMENT ARRESTS BASED ON KNOWN TRANSGRESSORS AND TRANSGRESSIONS OF THE LAW.

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Appendix B - Opinion of the United States Court of Appeals, Eighth Circuit of July 28, 1982 in United States v. R. C. French A-4

Appendix C - Order of United States Court of Appeals, Eighth Circuit denying Appellant's Petition for Rehearing and Rehearing En Banc, August 24, 1982 in United States v. R. C. French A-14

Cases Cited

United States v. French, 483 F.Supp. 523 (E.D. Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980) 4,7

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R. C. French, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above-entitled cause on July 28, 1982.

OPINIONS BELOW

This cause was originally decided by the United States District Court for the Eastern District of Missouri, Eastern Division, on September 4, 1981, see Appendix "A". Subsequently, this cause was then decided by the United States Court of Appeals

for the Eighth Circuit on July 28, 1982, see Appendix "B". A Petition for Rehearing, or in the Alternative, Motion for Rehearing En Banc was timely filed with the United States Court of Appeals, Eighth Circuit, on August 6, 1982. The Petition for Rehearing and or Rehearing En Banc was ordered denied on August 24, 1982. See Appendix "C".

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on July 28, 1982. The order of the United States Court of Appeals, Eighth Circuit, denying Petitioner's Motion for Rehearing, or in the Alternative, Motion for Rehearing En Banc was entered on August 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 19.1(b) of the Rules of the Supreme Court of the United States.

RELEVANT STATUTES

7 U.S.C. Section 2023(b)

Food Stamps - Violations and Enforcement.

(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorizations to purchase cards in any manner not authorized by this Chapter or the regulations issued pursuant to Chapter shall, if such coupons or authorizations to purchase cards are of the value of One Hundred Dollars ($100.00) or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than Ten Thousand Dollars ($10,000.00) or imprisoned for not more than five (5) years or both, or, if such coupons or authorizations to purchase cards are of the value of less than One Hundred Dollars ($100.00), shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than Five Thousand Dollars ($5,000.00) or imprisoned for not more than year or both.

STATEMENT OF THE CASE

R. C. French was charged under indictment by a Federal Grand Jury with three counts of acquiring and possession of food stamps in a manner not authorized by law or regulations, in violation of 7 U.S.C. Section 2023(b). He was tried in the District Court for the Eastern District of Missouri and was found guilty on all three counts. He was sentenced to imprisonment of five years and a fine of $1,000.00 on each count, the sentences to run concurrently.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit. The Appellate Court rejected the three basic arguments of the defendant; the first based on the question whether defendant in purchasing food stamps from undercover police officers was the victim of "entrapment;" the second based on instructions and the alleged failure of the government to produce sufficient evidence to prove a willful or intentional violation of the law; and the third based on procedural questions concerning introduction of evidence relative to a prior conviction.

The Eighth Circuit filed its Judgment and Opinion on July 28, 1982 affirming the District Court's Judgment and denying defendant's allegations on appeal. The defendant then moved the Court for a rehearing, or for hearing by the Court en banc. The same was denied on August 24, 1982. It is from that denial that the petitioner seeks this writ.

In presenting the facts in the light most favorable to the Government, the following evidence presented at trial is relevant to this Petition:

Marvin Koechig, Jr., a Special Agent with the office of the Inspector General for Investigation, United States Department of Agriculture, first became interested according to his testimony when he read accounts in both St. Louis newspapers

about French's earlier federal conviction.[1] Koechig read the newspapers and understood that defendant's counsel, in his request for probation, had claimed that the defendant was working sixty-two to eighty hours a week in a grocery store which was identified in the newspapers. Koechig says that he then became interested, since his job was to check grocery stores for food stamp violations. In his newly acquired interest he found that the store involved, Courtesy Country Store, had been the subject of a request for criminal investigation in September, 1980, and that its food stamp volume was more than one hundred percent of the gross reported sales. Koechig admitted that he had absolutely no knowledge that French was in any way dealing in, buying, or selling, or trafficking in food stamps. He claimed his only knowledge of French was the newspaper reports of French's conviction and subsequent probation.

Koechig contacted St. Louis Police Officer Antionette Lee, who worked under cover with him on earlier occasions looking for food stamp violators. Koechig provided Lee with three $50.00 books of food stamps and drove her to the Courtesy Country Store on January 7, 1981. She identified French and approached him. She had been instructed to approach French and no one else. She asked French if he knew anyone discounting food stamps. French asked her what she meant. French then indicated that the owner didn't like for them (the employees) to do it, but asked how many books she had. She had three $50.00 books. He subsequently offered her $50.00 for the books and she accepted the same and left.

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[1] United States v. French, 483 F.Supp. 523 (E.D.Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980). French's conviction for use of his office, as Chief Marshall for the City of St. Louis, to collect funds illegally, was set aside by the District Court but reinstated by the Eighth Circuit Court of Appeals. Certiorari was denied by the Supreme Court. Defendant was thereafter placed on probation by the District Court, and was on probation at the time of the violations alleged herein occurred.

No charges were immediately brought forward by Agent Koechig, but approximately six months later, on July 25, 1981, he resumed his investigation activities, not against the one hundred percent plus Courtesy Country Store, but the defendant French. Koechig had used an informant, James Louis, used by the FBI and various other Governmental agencies to locate French. French had quit his job as a clerk at the grocery store and was at this time working in a dry cleaning store. Koechig got the informant Louis to introduce the defendant to yet another undercover police officer, Rosalyn Morgan. Officer Morgan was equipped with a recording device and on July 25th drove with the informant to the cleaning establishment. French came to the car parked outside of the cleaning establishment at the request of the informer to meet a lady who had some stamps. French indicated that he didn't have the money and told the undercover female officer to get in touch with him later. She indicated that the stamps were not hot and that she needed to pay her rent, and all she wanted was a "little bit." French told her that he knew other persons, naming one Sweeney and Clemmons that might be interested after her repeated proposition that she could get her hands on as many stamps as she could get rid of. French told her that nothing was worth going to the penitentiary for. Morgan continued the conversation by suggesting that they go thirds on whatever she had, and French replied, "Okay . . . I know I can handle some." French asked that any calls to his house be made by Louis, the informer, and not Morgan, the female undercover officer. The defendant finally paid $65.00 ($75.00) for three books the lady had offered. A subsequent phone call by the informer led to arrangements for a meeting on June 26th.

The following day, June 26, 1981, the defendant was approached by Morgan, the undercover officer. Her story was that "her man" needed travel money and was getting "peeved." French wanted to take the officer out, but she declined. He subsequently purchased five more books for $100.00 on that day from her.

The agent continued making phone calls to the defendant to induce him into further purchases, but none were consummated.

The Government additionally provided evidence that some of the stamps purchased by French were ultimately cashed.

This was the basic evidence most favorable to the Government against the defendant and does not include defendant's evidence of the transaction.

REASONS FOR GRANTING THE WRIT

I

This case stated when a government agent, one Marvin Koechig, Jr., a Special Agent with the Office of the Inspector General of Investigation, United States Department of Agriculture, first became interested in the defendant when he read accounts in both St. Louis newspapers about French, then Chief Marshall of the City of St. Louis, having been convicted of the Hobbs Act violation.[1] French was paroled by the District Court and was working sixty to eighty hours a week in a grocery store. The agent decided to check out this convicted-paroled felon.

The further activities of the agent involved are detailed in the Statement of the Case. They are partially repeated here since they constitute the foundation of defendant's legal argument.

The basic claim of the defendant in his appeal of this matter is that the government failed to prove by sufficient evidence that the defendant was "predisposed" to commit the crime involved; that the Court's allowance of an instruction to the jury was an evasion of the Court's duty; and that the Court failed in its duty to declare, as a matter of law, that the defendant was "entrapped." Defendant contends the prosecution had failed to sustain its burden of proof so as to make a submissible case to a jury on the question of "entrapment," so as to allow the matter to be submitted to the jury for their decision.

This case is an example of the particular selection of an individual by a Governmental enforcement or agency to be targeted and for whatever reasons punished. He was selected

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[1] *United States* v. *French*, 483 F.Supp. 523 (E.D.Mo. 1980), *rev'd* 628 F.2d 1069 (8th Cir. 1980), *cert. denied* 449 U.S. 956, 66 L.Ed.2d 221 (1980).

because he was a felon on probation. The "entrapment" was a "honey pot" governmental technique that has been repeatedly used by the FBI and other governmental agencies.

The question of entrapment has long been acknowledged by this Court as a defense. *Sorrells* v. *United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). The definition of the defense was more clearly presented by this Court in the case of *Sherman* v. *United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). The Court there held that a government agent repeatedly soliciting a drug addict who was trying to go straight, was guilty of entrapment as a matter of law. The Court indicated federal public policy determined that it is better to let a technical transgressor go free than to allow federal law enforcement officials to manufacture crime that entraps the unwary innocent.

The entrapment defense has two interrelated, but distinct elements: Inducement and Predisposition. See *Hampton* v. *U.S.*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), and *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973).

In this case there is no question that a specific inducement was made directly and solely to the individual defendant to buy unauthorized food stamps at a bargain price. The agent stated that defendant's employer was suspect of overdealing in stamps but admittedly went after the defendant specifically and made no effort to follow up on the employer.

When such a set of facts is presented and the entrapment issue is joined, the burden is on the government "to disprove the whole defense beyond a reasonable doubt." *United States* v. *Watson*, 489 F.2d 504, 510 (3d Cir. 1973).

In other words, it is up to the government to then prove that the defendant was "predisposed" to commit the crime. "The controlling question is whether the defendant is a person other-

wise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." See *Sorrells, supra,* 287 U.S. at 451, 53 S.Ct. at 216.

The Eighth Circuit in rendering its decision, appallingly uses the *Sherman, supra,* case to conclude that officers herein had trapped an "unwary criminal" as opposed to a presumed innocent. The Eighth Circuit seems to fail to realize that in *Russell* and specifically the *Hampton* case, *supra,* upon which it relies, the defendants admitted to a predisposition to commit the crimes alleged and were engaged in the usage of drugs and the manufacture of them at the time they were apprehended. Defendant was not involved, alleged to be involved, or proven to be involved in trafficking in food stamps in any way. The fact that he was on probation does not make him an unwary criminal, see *Russell, supra.* A distinction in the type of cases must be made. The defendant was a *passive* target. He was not engaged in criminal activity. The government agent, on the other hand was *actively* engaged in criminal activity.

The crux of the problem in this case, as in any entrapment case, is the question of being "innocent until proven guilty." Have we foregone that right? Can a subjective decision made by a police officer transfer us to the presumed "guilty" class? Will agents provocatuer be allowed in this Republic? Will any limitations be placed upon them?

A minimum legal threshold as to the elements of entrapment must be established in any case. If the minimum requirements of proof are not met by the prosecution as herein, then the Court as a legal matter must strike down the case. When the prosecution clearly showed a design of inducement originating in a federal officer's mind directed toward one individual in order to try to obtain a conviction of that individual, then the government must present clear and convincing evidence, sufficient for

a jury to make a reasonable judgment as to the defendant's predisposition, if any. There was no evidence presented as to French having either dealt in food stamps or having previously acquired the same. The prosecutor having failed to produce such evidence, the Court must, as a matter of law, rule for the defendant and dismiss the case. See, *United States* v. *Jannotti*, 673 F.2d 578 (1982) and the dissent therein. The trial Court failed to do so, and the Appellate Court failed to remedy that error. The Appellate Court's conclusion that defendant's own wiretapped statements were sufficient to create a question of fact for the jury on the question of entrapment is erroneous, see *U.S.* v. *Lemmons*, 420 F.2d 135 (3rd Cir. 1972). We ask for this writ so that a full hearing on the question of "entrapment" can be had, reviewed, and ruled upon.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that Charles M. Shaw, Shaw, Howlett & Schwartz, Attorneys for Petitioner herein, have served upon the following, three copies of the above Petition for Writ of Certiorari: Solicitor General, Department of Justice, Washington, D.C. 20530: Thomas Dittmier, United States Attorney, 1114 Market Street, St. Louis, Missouri 63101.